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In the Supreme Court of the United States

OCTOBER TERM, 1955.

No. 422.

RANCO INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT.

BRIEF FOR PETITIONER, RANCO INC.

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OPINIONS BELOW.

There was no opinion by the Court below, but its judgment (R. 143) is reported at 222 F. (2d) 543. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 130a-138a) are reported at 109 NLRB 998.

JURISDICTION.

The judgment of the Court below was entered on April 27, 1955 (R. 143). Petition for Rehearing was duly filed and was denied on June 30, 1955 (R. 144). The petition for writ of certiorari, filed on September 26, 1955, was granted on November 14, 1955 (R. 144). The jurisdiction of this Court rests on 28 U. S. C. 1254 and Section 10(e) of the National Labor Relations Act, as amended.

QUESTION PRESENTED.

Where Petitioner is charged only with having denied Union representatives an opportunity to distribute literature on its premises, where Petitioner had a long-standing rule prohibiting distribution of literature on its premises by non-employees (which rule was uniformly enforced as to all types of distributions), where Petitioner freely permitted its employees to distribute literature of all kinds both within the plant and within the confines of its property, where both pro-union and anti-union literature was distributed on its property by its employees, and where there was an area immediately outside the plant gates where non-employee organizers could and did effectively distribute union literature, did Petitioner violate Section 8(a) (1) of the National Labor Relations Act by prohibiting the distribution of literature on its parking lot by non-employee union organizers?

STATUTE AND CONSTITUTIONAL PROVISION INVOLVED.

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. 151, *et seq.*) are set forth in the Appendix *infra*, pp. 37-39, as is the text of the Fifth Amendment to the United States Constitution.

STATEMENT.

I. THE FACTS.¹

A. Background of Petitioner's Rule as to Distribution of Literature on Its Premises.

The petitioner is engaged in the manufacture of thermostatic controls. Its principal offices are located at Columbus, Ohio, where it has three plants. It also operates plants at Delaware, Ohio, and at Plain City, Ohio. The Delaware, Ohio plant is the only one involved in these proceedings (R. 101a, footnote 1).

About November 29, 1950, the petitioner posted at its Delaware plant a rule reading as follows:

"Delaware Plant employees are permitted to distribute literature on Company property, but not on Company time."

(G. C. Ex. 2, R. 14a.)

That notice remained posted in the plant from the date of its first posting and was in effect at the time of the proceedings herein (R. 14a-15a, 56a).

The Board expressly found that pursuant to the rule, the petitioner "uniformly permitted employees to distribute literature at the guard house gates between the plant and the parking lot" and that both "union and anti-union literature has been passed out there by employees without hindrance" from the petitioner (R. 104a).

The Board also found that the petitioner interpreted and applied its rule to restrict the distribution of literature of any sort on its premises to Company employees and representatives (G. C. Ex. 4; R. 16a, 105a-106a). Thus,

¹ Contrary to the usual NLRB order under consideration by the Court, there exists no dispute as to evidentiary facts in this case.

for example, in May, 1953, the petitioner refused a request by non-employee representatives of the American Legion and the Veterans of Foreign Wars to sell Buddy Poppies at the guard house (within the confines of its property) and suggested to those organizations that *employees* undertake that task (Resp. Exs. 1A and 1B; R. 37a, 104a-105a).

The record is completely devoid of any evidence of any unfair labor practices on the part of petitioner. On the contrary, it shows a "clean" background, the various charges previously filed against it having been withdrawn or dismissed by the Board after hearing (R. 98a-99a, 105a, 123a, and 57 NLRB 425).

The nub of this case is the Board's finding that petitioner violated Section 8(a)(1) of the National Labor Relations Act, as amended, by denying to non-employee union organizers the privilege of distributing literature on its parking lot (R. 131a). The circumstances are described in more detail in the following pages of this brief.

B. The Physical Layout of the Plant Permits Non-Employee Union Organizers to Make Effective Distribution of Union Literature, and They Have Frequently Done So.

Petitioner's Delaware Plant is located just inside the city limits of Delaware, Ohio, a city of 12,000 population (R. 101a). It is located 1.7 miles from the center of the city. The plant premises are enclosed by a fence and cover some 28 to 30 acres of land (R. 101a-102a). The plant buildings are located on the northerly portion of the property, and the parking lot in which the hourly-paid employees park is located east of the plant buildings (G. C. Ex. 5, R. 17a).

After parking in the parking lot, employees enter the plant buildings by passing through either one of two guard house gates located in the front and back of the plant. These guard house gates are necessary for the purpose of identification, as the employees are required to wear identification badges (R. 102a).

All employees must enter the fenced premises from the highway fronting petitioner's land (U. S. Route 42) through the so-called West gate (25 feet wide) and may leave either through the West gate or the East gate (36 feet wide). The two gates are separated by a broad grass area (G. C. Ex. 5, R. 17a, 102a).

- (1) **There Is a Thirty-Foot Public Area Between the Plant Gates and the Highway in Which Non-Employee Union Organizers May Distribute Literature, and They Have Frequently Done So.**

The East and West gates through which all employees must enter the plant are located 30 feet south of the highway. This creates a public area 30 feet in depth over which all employees must pass.

The Board found that non-employee Union organizers distributed Union literature to petitioner's employees on at least 25 different occasions in the public area between the highway and the gates (R. 73a-74a, 106a).

- (2) **Traffic Regulations Enforced by Petitioner and by the State Highway Patrol Require That Employees Stop Their Cars in the Driveway Prior to Entering U. S. Route 42.**

The Board found that official State Highway "Stop" signs are posted at the exits from petitioner's property (G. C. Ex. 5; R. 61a, 104a). They require that employees come to a full stop before entering the highway, which is a very heavily-traveled thoroughfare (R. 61a-62a).

The record shows that Route 42 is closely policed by the Ohio Highway Patrol to enforce its "Stop" rules, and the Board so found (R. 62a, 104a).

The record also discloses that petitioner made continuous efforts to "get (the employees) to cooperate * * * to come to a full stop before entering Route 42" (R. 62a) and that it had received "pretty good cooperation" (R. 72a). This was affirmed by the Board's finding that only about 10% of the cars failed to stop (R. 104a).

(3) The Traffic Conditions Created by Petitioner's Employees Leaving the Plant Give Non-Employee Organizers Ample Opportunity to Effectively Distribute Union Literature.

The Board found that at shift-change time, traffic jams up between the plant gates and Route 42.² As a result, automobiles stop in the driveway and in the 30-foot area outside petitioner's property, where non-employee union representatives have distributed Union literature on at least 25 occasions (R. 73a-74a, 106a).

C. Effective Distribution of Union Literature Was Made by Employees on Petitioner's Property.

The Board further found that a number of petitioner's employees distributed union literature on petitioner's premises from time to time without hindrance (R. 104a). A record kept of such distribution showed that employees distributed literature on plant property on at least seven (7) different calendar days from March 31, 1953 through June 2, 1953 (Resp. Ex. 2, R. 38a-40a, 65a-66a). Literature was distributed at the guard gates both by employees favoring and by employees opposing the Union (R. 93a, 104a).

² UAW-CIO organizer Peters testified that as many as 20 cars would line up in each lane (R. 76a).

In addition to distributing Union literature on the plant premises, many of petitioner's employees further publicized the UAW-CIO's cause by wearing UAW-CIO tee shirts and UAW-CIO badges in the plant during working hours (Resp. Ex. 3, R. 41a, 104a). These tee shirts and badges were supplied by the UAW-CIO and petitioner freely permitted its employees to wear such badges and tee shirts within the plant.

D. The Union Representatives Had Still Other Facilities Available for Contact With Employees Who Desired Union Assistance.

The record shows that the Union maintained an office in Delaware, Ohio and that it repeatedly publicized the address and telephone number of its office (G. C. Ex. 6, R. 20; G. C. Ex. 8, R. 35a-36a; Resp. Ex. 5, R. 42a-43a; Resp. Ex. 6, R. 44a-45a; Resp. Ex. 7, R. 46a-47a; Resp. Ex. 8, R. 48a-51a; Resp. Ex. 9, R. 52a-53a).

It also shows that the Union had available to it and used a meeting hall (Eagles' Hall) in Delaware. The capacity of that hall was apparently large enough to accommodate all employees who desired to attend union meetings, and the wives of such employees (Resp. Ex. 7, R. 46a-47a).

II. THE BOARD'S CONCLUSIONS AND ORDER.

Board Members Murdock and Rodgers affirmed the Trial Examiner's recommended order, which was based on the ground that "the burden is upon the employer to show the existence of circumstances warranting the prohibition" of non-employee distributors of literature from the parking lot (R. 130a-131a).

Chairman Farmer and Member Peterson affirmed the order, but on the basis of their finding that the General

Counsel had sustained the affirmative burden of proving that it was "impossible or unreasonably difficult" for non-employee union representatives to distribute organizational literature to the employees entirely off the employer's premises (R. 134a-135a).

Member Beeson dissented on the ground that the facts found by the Board showed no serious impediment to the rights of the employees to secure information (R. 135a-137a).

By a split Board, the following order was issued:

"1. Cease and desist from prohibiting the distribution of union literature by union representatives on its parking lot except pursuant to reasonable regulations or controls not of such character as to deny them access to employees for the purpose of effecting such distribution.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Rescind its plant rule respecting distribution of literature on its premises, insofar as the rule prohibits the distribution of union literature by union representatives on the Respondent's parking lot at the Delaware plant; except pursuant to reasonable regulations or controls not of such character as to deny them access to the employees for the purpose of effecting such distribution."

III. THE DECISION OF THE COURT BELOW.

The Court of Appeals for the Sixth Circuit enforced the Board's Order without opinion. However, in its judgment entry, it held that the Board had properly applied the principles of decisions in *NLRB v. Monarch Machine Tool Company*, 210 F. (2d) 183, 184-187 (C. A. 6) certiorari denied 347 U. S. 967; *NLRB v. Lake Superior Lumber Co.*, 167 F. (2d) 147, 150 (C. A. 6); and *NLRB*

v. Le Tourneau Company of Georgia, 324 U. S. 793, 797, 798.

SUMMARY OF ARGUMENT.

(1) The position of the Board throughout this proceeding (and apparently that of the Court below) was that this Court's decision in *NLRB v. Le Tourneau*, 324 U. S. 793, is dispositive of the issue herein. Such a conclusion is untenable. This Court decided only the issue presented to it in *Le Tourneau* and the Board's decision and that of this Court definitely excluded the question here involved.

(2) Nor can the principle enunciated in *Le Tourneau* be logically or constitutionally extended to affirm the order of the Court below. The explanation of this Court's opinion in *Le Tourneau* subsequently given by Mr. Justice Reed in *NLRB v. Stowe Spinning Co.*, 336 U. S. 226, 243, makes it clear that such an extension would be contrary to the rule of *Le Tourneau* and that it would raise a serious constitutional question under the Fifth Amendment.

(3) The Board's order improperly equates the rights of non-employee union representatives seeking to organize petitioner's employees with those of the employees themselves (for the protection of whose rights to organize or not to organize the Act was passed).

(4) The evidentiary facts found by the Board show that petitioner accorded to its employees the full measure of the rights assured to them by the Act and that they freely exercised those rights. They further show, despite the Board's conclusion to the contrary, that the petitioner's denial of permission to non-employee organizers to distribute union literature on its parking lot did not create any serious impediment to the distribution of union literature to the employees; nor did that denial make it "im-

possible or unreasonably difficult" for the union to distribute literature.

The employees themselves distributed union literature on the premises on at least seven occasions. They freely wore tee-shirts bearing large UAW-CIO insignia within the plant; they wore UAW-CIO buttons within the plant without hindrance from petitioner. And the union maintained an office in Delaware, Ohio and had a large meeting hall in Delaware available to it, at which locations it could discuss the union and its aims with the employees.

Finally, the UAW-CIO non-employee representatives distributed union literature at the 30-foot-wide public area outside the plant gates on about 25 occasions, under traffic conditions which required employees' cars to stop and under which the Board itself found that 90% of the cars did stop (R. 104a).

While the non-employee organizers might have felt that it would be more *convenient* for them to distribute literature under other circumstances, the petitioner "is not required to aid employees to organize" because "the law forbids only interference." *NLRB v. Stowe Spinning Co.*, 336 U. S. 226, at 240-241.

(5) This case involves a narrow charge against the petitioner, involving only enforcement of its rule prohibiting non-employee union representatives "from circulating or distributing among the employees * * * pamphlets, literature and other written and printed material. * * *" (G. C. Ex. 1 C, R. 6a). Nevertheless, the Board's findings and its position in the Court below show that the real basis for its order is based on the theory that denial to non-employee union organizers of the privilege to distribute literature at the petitioner's parking lots did not give such organizers an "opportunity for discussion" with the employees (R.

106a). Petitioner was not charged with any such violation. *A fortiori*, no such violation could be found. *Consolidated Edison Co. v. NLRB*, 305 U. S. 197, 238.

(6) Reversal of the Board's order is required on the basis of the foregoing contentions, without more. Further enforcement of the Board's order in this case would constitute a taking of petitioner's property in violation of the Fifth Amendment.

ARGUMENT.

I. THIS COURT'S DECISION IN *LE TOURNEAU* DID NOT DECIDE THE ISSUE INVOLVED HEREIN. THE QUESTION PRESENTED HERE HAS NEVER BEEN DECIDED BY THIS COURT.

The emphasis laid upon *NLRB v. Le Tourneau Company of Georgia*, 324 U. S. 793, by the Board and by the Court below makes appropriate an analysis of that decision to determine what it did actually decide.

We start with the basic principle that this Court decides only the specific issue presented to it in each case and with the pronouncement that

"However general and loose the language of opinions, the specific situations have controlled opinion."

Hughes v. Superior Court of California, 339 U. S. 460, 465.

What was the issue in *Le Tourneau*? In its decision, the Board stated it in the following terms:

"* * * the sole question confronting us is whether, under the circumstances of the instant case, to the extent that the rule prohibits distribution of Union literature by employees on parking lots, it constitutes such a serious impediment * * * that the right to self-organi-

zation must be held paramount, and the rule give way." (Emphasis ours.)

54 NLRB 1253, 1260.

The Board thereupon found that the *suspension of two employees* for violating the rule was violative of the Act:

When the case finally arrived before this Court, the Board restated the limited scope of its decision as follows:

"The facts in the instant case do not present and the Board did not consider the question which would arise if union representatives who were not employed at the plant sought to distribute literature on the parking lots * * *" *Board Brief in Case 452, October Term, 1944, page 29, footnote 17.*

Nevertheless, and even though the Board had expressly disavowed any consideration in *Le Tourneau* of the question which would arise "if union representatives who were *not employed* at the plant sought to distribute literature on the parking lot," the Board's decision in the instant case describes *Le Tourneau* in broad terms as having decided the issue of the "right to distribute union literature on company automobile parking lots" (R. 107a, 130a-131a).

The Board has thus engrafted onto *Le Tourneau* an extension which was expressly excluded from decision both by the Board and the Court, and the Board thereby seeks to secure enforcement of its order against the petitioner.

II. EXTENSION OF THE LE TOURNEAU DÉCISION TO ENCOMPASS NON-EMPLOYEES IS CONTRARY TO THIS COURT'S DECISION THEREIN.

Mr. Justice Reed was the author of the opinion in *Le Tourneau* and may be fairly assumed to appreciate the full import of this Court's opinion in that case. In the case of *NLRB v. Stowe Spinning Co.*, 336 U. S. 226 (1949), the majority opinion affirmed, with modification, a decision of the Board holding that the employer had violated the Act by requiring that a fraternal organization cancel a rental agreement for use of a Company-owned hall by the union. Pointing out that "What the Board found, and all we are considering here, is discrimination," 336 U. S. 226, 233, the Court ordered the employer to refrain from any activity which would cause a union's application to be treated on a different basis than those of others. Thus, it clearly appears that "discrimination"—and no other theory—formed the basis of this Court's order in *Stowe Spinning Co.*

In his dissent, even on that theory, Mr. Justice Reed discussed *Le Tourneau* in detail. (Chief Justice Vinson joined in the dissent.) He expressly pointed out that the *Le Tourneau* and *Republic Aviation* cases were quite different from the situation in *Stowe Spinning* in that the former cases related to forbidding employees to foster union organization on the employer's premises or in the plant during their non-working time.

Mr. Justice Reed stated that

"It is only when there is a violation through an interference with or a restraining or coercion of employees' rights under Section 7 that an unfair labor practice finding may be predicated upon the employer's acts. The employer is not required to aid employees to organize. The law forbids only interference."

336 U. S. 226, 240-241.

He then discussed the property rights of an employer in the following terms:

"There is nothing in this record that indicates a situation such as exists in employer owned lumber camps or mining properties. Where an employer maintains living, recreation and work places on such business premises open to employees by virtue of their employment, it has been held that exclusion of union organizers from contact with the employees is an unfair labor practice and that the Board's ordering the employer to grant union representatives access in non-working hours to the employees under reasonable regulations is a proper means to effectuate the purpose of the Act. *Labor Board v. Lake Superior Lumber Corp.*, 167 F. (2d) 147. *It has never been held that where the employees do not live on the premises of their employer a union organizer has to be admitted to those premises.*" (Emphasis ours.)

336 U. S. 226, 243.

Mr. Justice Reed noted that there, as in the instant case, the employees were not isolated beyond the hours of employment from union organizers, nor were the organizers denied access to the employees, because they could solicit them on the streets, in their homes or at public meeting houses within a few miles of their employment.

He then stated that

"After an organizer has convinced an employee of the value of union organization, that employee can discuss union relations with his fellow employees during non-working hours in the mill. This gives opportunity for union membership proliferation. *Republic Aviation Corp. v. Labor Board* and *Labor Board v. Le Tourneau Company of Georgia*, 324 U. S. 793."

336 U. S. 226, 243.

Finally, pointing out that *Le Tourneau* dealt with a limitation by the employer upon the right of his employees to solicit union membership on company property during their free time, Mr. Justice Reed stated that this doctrine could not be extended to require the employer to furnish a forum for organizational efforts by outsiders.

It is therefore urged by petitioner here that in the absence of "discrimination," which was the foundation of the majority opinion in *Stowe Spinning Co.*, *supra*, the dissenting opinion of Mr. Justice Reed and Chief Justice Vinson correctly sets forth the principle of law applicable to an employer's right to exclude non-employees from his premises.

A. The Court Below Misconstrued *Le Tourneau* and Thereby Decided This Case Erroneously.

As was shown at page 8, *supra*, the Court below wrote no opinion. However, its judgment entry (R. 143) shows that in affirming the Board's order, it relied on *NLRB v. Le Tourneau Co. of Georgia*, *supra*, *NLRB v. Lake Superior Lumber Co.*, 167 F. (2d) 147, and *NLRB v. Monarch Machine Tool Co.*, 210 F. (2d) 183, cert. den. 347 U. S. 967. An analysis of those authorities discloses their inapplicability to the instant case. As a result, the foundation of the decision of the Court below was erroneous and its decision wrong.

(a) *Le Tourneau* Is Not Applicable.

In view of the discussion hereinbefore on the effect of *Le Tourneau*, no further comment thereon is deemed necessary.

(b) *Lake Superior Lumber Co. Is Clearly Inapposite.*

Lake Superior Lumber Co. involved a lumber camp some 18 miles from the nearest town. The employees remained at the camp seven days per week. The employer had a rule which strictly limited the visiting rights of the union representatives who were the bargaining agents for the employees. Obviously, if the chosen representatives of the employees were unable to confer with the employees whom they represented at their homes (the camp living quarters), the employees' rights under the Act to confer with their union representatives would have become meaningless.

The *Lake Superior Lumber* case presents facts analogous to those in "mill-town" cases, as to which this Court pointed out that a "company-dominated North Carolina milltown" cannot be equated with metropolitan centers where halls are available within easy reach of prospective union members. *NLRB v. Stowe Spinning Co.*, 336 U. S. 226, 230.

The Sixth Circuit carefully pointed out, in affirming the Board's order, that *Lake Superior Lumber Co.* presented a situation in which the employees lived on the property involved and spent their free time on the camp property as a matter of right. 167 F. (2d) 147, 152.

Under those circumstances, the Sixth Circuit held that a non-employee union organizer must be permitted access to an employer's premises where the situation was such that union organization "must proceed on the employer's premises or be seriously handicapped." The difference between that factual situation and that here present is so patent as to require no further discussion. See also *NLRB v. Seamprufe, Inc.*, 222 F. (2d) 858; *NLRB v. Babcock & Wilcox*, 222 F. (2d) 316; *NLRB v. Monsanto Chem-*

ical Co., 225 F. (2d) 16; and *Marshall Field & Co. v. NLRB*, 200 F. (2d) 375.³

(c) *Monarch Machine Tool Co. Does Not Support the Decision Herein of the Court Below.*

Again, in *Monarch Machine Tool Co.*, *supra*, the Sixth Circuit relied primarily on *Le Tourneau*, *supra*, and on *Republic Aviation Corp.*, 324 U. S. 793, both of which dealt only with activities by "employees" on the employer's premises (210 F. (2d) 183, 186-187).

The *Monarch* case involved a situation where the company had in effect a *blanket prohibition* against the distribution of literature by anyone on its premises. The Ninth Circuit recently analyzed the *Monarch* decision in detail and concluded that

"There is reason to assume that the Court treated that as a case involving distribution of literature by *employees* for it cited as authority for its decision the *Le Tourneau* case, *supra*, without any suggestion that the facts presented before the Court were any different than those there involved."

NLRB v. Monsanto Chemical Company, 225 F. (2d) 16, 19.

The foregoing makes it clear that the cases relied on by the Court below were not applicable to the factual situation here presented, and that the Court therefore erred in enforcing the Board's order on the basis of those cases.

³ In *Marshall Field & Co. v. NLRB*, *supra*, the Seventh Circuit upheld that portion of the Board's order requiring the employer to permit non-employee organizers to use a private alleyway separating the two portions of the employer's building. However, this was done only because the privately-owned alleyway "partakes of the nature of a city street." 200 F. (2d) 375, 380. (The Board had found that the alleyway "traverses the center of the (employer's) store at street level. It is open to the public for pedestrian use." *Marshall Field & Co.*, 98 NLRB 88, 93.)

**III THE DECISION OF THE COURT BELOW IMPROPERLY
EQUATES THE RIGHTS OF NON-EMPLOYEE ORGAN-
IZERS WITH THOSE OF EMPLOYEES.**

Section 7 of the Act, *infra*, p. 37, provides that "Em-
ployees shall have the right of self organization, to form,
join or assist labor organizations. * * *"

It is clear that the purpose of Section 7 and Section
8(a) (1), which provides that

"It shall be an unfair labor practice for an employer—
(1) to interfere with, restrain or coerce *employees* in
the exercise of the rights guaranteed in Section 7,"

is to protect the rights of *employees* and not the rights of
strangers who bear no relationship whatsoever to said em-
ployees or to their employer.

The distinction between the rights of employees or
those who represent them in collective bargaining and the
rights of non-employee strangers who do not represent the
employees to come upon the employer's property has long
been recognized by the Courts. For example, in *NLRB v.*
Cities Service Oil Co., 122 F. (2d) 149 (1941), the Court
of Appeals for the Second Circuit held that the employer
therein violated the Act by refusing to permit Union repre-
sentatives who represented certain of its employees, to
come aboard its tanker in order to investigate and nego-
tiate concerning grievances. However, the Court then
stated as follows:

"There can, however, be no reason for giving the repre-
sentatives of the Union passes in order that it may
solicit new members or collect dues. Such activities
were not shown by the Board to have been required
'for the purpose of collective bargaining or other mu-
tual aid or protection' even if they are guaranteed un-
der Section 7 under some circumstances. The rights
guaranteed by Section 7 primarily concern bargaining

as to terms and conditions of employment and not the perpetuation of the tenure of any particular agent.

"Under 2(a) of the order the conditions and the number of passes are to be determined by collective bargaining but at all events the employer should not be required to issue passes except subject to the condition that they will be forfeited if the holder shall use his access either to solicit union membership or to collect dues." (Emphasis ours.)

NLRB v. Cities Service Oil Co., 122 F. (2d) 149, 152.

A similar issue was involved in *Richfield Oil Corp. v. NLRB*, 143 F. (2d) 860 (1944). The Ninth Circuit there held that the employer was required to permit Union officials to board its vessels

"for the purpose of collective bargaining, for the discussion and presentation of grievances, and for other mutual aid and protection of the employees represented by these unions, including the collection of dues and distribution of trade papers to union members, provided, however, that the petitioner is not required to issue passes for the solicitation of membership." (Emphasis ours.)

Richfield Oil Co. v. NLRB, 143 F. (2d) 860, 863.

It is thus apparent that both the Second and Ninth Circuits recognized the right of union representatives to come on the employer's premises for fulfillment of the collective bargaining process where the Union was the collective bargaining representative of employees working and living on the tankers, but even then, they held specifically that the Union representatives had no right to enter upon the tankers for the purpose of soliciting Union membership.

In the instant case, the Board's order requires that petitioner accord to strangers a right which the Courts in

Richfield Oil Co. and *Cities Service Oil Co.* denied even to union representatives who represented certain employees therein, to-wit, the right to enter upon petitioner's premises for the purpose of encouraging union membership.

The Ninth Circuit recently reaffirmed its recognition of the statutory difference between the rights of employees and outside organizers seeking to represent them in *NLRB v. Monsanto Chemical Co.*, 225 F. (2d) 16. The court there said:

"It is to the employees that rights are granted by Section 7. Notwithstanding the section also grants them the right to 'refrain from any or all of such activities,' it may fairly be said that in a situation such as that presented by the *Lake Superior Lumber Corp.* case, *supra*, the employees' rights include the right to have union organizers approach them. But the facts here do not present that kind of case."

NLRB v. Monsanto Chemical Co., 225 F. (2d) 16, 21.

The Tenth Circuit, which decided the *Seamprufe* case, *supra*, had the following to say:

"As we have seen, the fundamental basis for permitting the solicitation of union membership on company property is to vouchsafe the guaranteed right of self-organization * * * *NLRB v. LeTourneau*, *supra*. When conducted by employees the solicitation amounts to the exercise of a right subject only to the correlative right of the employer to maintain plant production and discipline. An employee on Company property exercising the right of self-organization does not violate a company no-trespass rule. * * * But a non-employee labor organizer who comes upon company property in violation of a non-discriminatory no-trespass rule can justify his presence there only insofar as it bears a cogent relationship to the exercise of the employees' guaranteed right of self-organization."

NLRB v. Seamprufe, Inc., 222 F. (2d) 858, 860-861.

And the Seventh Circuit, which decided *Marshall Field & Co. v. NLRB*, 200 F. (2d) 375, stated that:

"The courts have held that Sec. 7 of the Act gives a right to a non-employee to enter and solicit union membership on an employer's premises under two general situations, the first of which is where there has been discrimination. * * *. However, the Board found that discrimination did not exist in the instant case. The second situation is where union organization must proceed upon the employer's premises or be 'seriously handicapped.' An illustration is where a lumber camp is isolated and its very location prevented employees from gaining access to outside contacts. * * *"

Marshall Field & Co. v. NLRB, 200 F. (2d) 375, 379.

The fallacy of equating the rights of employees and those of non-employee organizers becomes apparent upon consideration. As we have pointed out, the Act expressly protects the rights of "employees." This Court has repeatedly held that one can assert only his own rights and not the rights of others. *Jeffrey Mfg. Co. v. Blagg*, 235 U.S. 571, 576; *Virginian Railway v. Federation*, 300 U. S. 515, 558; *Bourjois, Inc. v. Chapman*, 301 U. S. 183, 190. Therefore, where, as in the instant case, the employees have been granted the full exercise of their rights and none are complaining, outside union organizers have no claim of right to enter upon petitioner's property against its will in an attempt to organize the employees.

Thus, although the Board has repeatedly held that an employer rule prohibiting solicitation of membership by employees within the plant during their non-working time is a violation of the Act (for the leading case, see *Peyton Packing Co.*, 49 NLRB 828, 843, quoted by this Court in *Le Tourneau*, 324 U. S. 793), we cannot conceive of even the Board arguing that because employees may solicit

within the plant, that *non-employees* may also enter the plant for such a purpose.

Under the circumstances of this case, the Board's failure to recognize the basic distinction between the rights of employees and outsiders seeking to organize them led it into issuance of an erroneous order.

IV. THE FACTS FOUND BY THE BOARD, AND OTHER UNDISPUTED FACTS IN THE RECORD SUPPORT ONLY THE CONCLUSION THAT IT WAS NOT "IMPOSSIBLE OR UNREASONABLY DIFFICULT" FOR THE UNION TO DISTRIBUTE LITERATURE.

The issue here, as in the Court below, is not one of fact. It is an issue of law based on facts found by the Board and on other undisputed facts appearing in the record.

Under the rule of substantiality "on the record considered as a whole" (Section 10(e) of the Act—*infra*, pages 37-39) and the principles enunciated in *Universal Camera Corp. v. NLRB*, 340 U. S. 474, 490, it is appropriate here to discuss the evidentiary facts, which belie any finding of "impossibility or unreasonable difficulty" (R. 134a).⁴

The Board findings, and other undisputed evidence in the record, show that both *non-employee* organizers and employees were able to and did effectively distribute literature to the employees, despite the restriction imposed

⁴ The burden of proof is upon the Board and does not shift to the employer at any time, *United Packinghouse Workers v. NLRB*, 210 F. (2d) 325, 329, and the Board must prove its charges affirmatively by substantial evidence. *NLRB v. Mc-Smith Garment Co.*, 203 F. (2d) 868; *NLRB v. National Die Casting Co.*, 207 F. (2d) 344. Board Members Murdock and Rodgers erroneously imposed the burden of proof on the petitioner (*supra*, p. 7); Board Members Farmer and Peterson recognized the above rule on burden of proof but arrived at an incorrect conclusion from the evidentiary facts found by them (*supra*, pp. 7-8).

on non-employee union representatives This is shown by the following:

(1) Petitioner freely allowed its employees to distribute literature on its property (G. C. Ex. 2; R. 14a, 104a).

(2) The employees did distribute union literature to employees going to or from the parking lot on at least seven (7) separate days (Resp. Ex. 2, R. 38a-40a, 104a).

(3) The employees were permitted to wear Union badges and tee-shirts within the plant to publicize the Union (R. 104a).

(4) All the employees had to enter or leave the plant through either of two gates 30 feet apart and 25 and 36 feet wide (R. 102a-103a).

(5) An area 30 feet wide, separating the plant fence and the highway, was available for non-employee distributors. It was used by them on twenty-five separate days for the purpose of distribution of literature (R. 102a, 106a; G. C. Ex. 5).

(6) Enforced traffic regulations, and State Highway "Stop" signs, result in 90% of the cars stopping in the 30-foot strip, giving the union organizers ample opportunity to distribute literature (R. 104a).

(7) The traffic jams which result when some 200 cars leave the plant premises in the space of 10 or 15 minutes also cause the employees to stop their cars in the area between the plant gates and Route 42 and gives the non-employee union organizers further opportunity to distribute union literature (R. 103-104a).

(8) Petitioner's plant is located just inside the city limits of Delaware, Ohio, a city of 12,000 population (R. 101a) so that all of the facilities of a city of that size are available to the Union for meetings, including the use of a hall. (R. 46a-47a; Resp. Ex. 7).

In *NLRB v. Seamprufe, supra*, under facts more favorable to the Board than those in the instant case it had found "special circumstances of inaccessibility." Nevertheless, the Tenth Circuit held that:

"We do not think that conclusion is legally justified by the facts. True, the union organizers could not contact the employees at the entrance or exit to the company property, but these circumstances did not insulate the employees from the union organizers. Unlike the employees of a lumber or mining camp who live and work on company property isolated from outside contacts, as in *NLRB v. Lake Superior Lumber Corp., supra*, the employees here lived in or near a small city and were easily accessible to union solicitors. There was no impediment to union solicitation off company property amounting to a deprivation of the right of self-organization."

NLRB v. Seamprufe, Inc., 222 F. (2d) 858, 861.

The above rule was quoted with approval and followed by the Court of Appeals for the Ninth Circuit in *NLRB v. Monsanto Chemical Company*, 225 F. (2d) 16, 21.

Although the Board has placed considerable over-emphasis on the alleged hazards faced by those non-employees who distributed union literature some twenty-five times outside of petitioner's property, it has completely disregarded those facts detailed above which show conclusively that the facilities present in this case permitted effective distribution of such literature by said non-employees outside petitioner's property and by employees on petitioner's property.

The Board has so completely ignored the facilities which make employees available to non-employee organizers outside petitioner's property that it must be assumed that the Board concluded that the adequacy of such

facilities is irrelevant.* This is the same position taken by the Board in *NLRB v. F. W. Woolworth Co.*, 214 F. (2d) 78 (1954), where a no-solicitation rule was involved. In that case the Court of Appeals for the Sixth Circuit stated as follows:

"The Board contends here the adequacy of facilities is irrelevant. But the Supreme Court in *NLRB v. Stowe Spinning Co.*, *supra*, clearly indicates the question is material."

NLRB v. F. W. Woolworth Co., 214 F. (2d) 78, 83.

Because the adequacy of the facilities present for effective distribution of literature is material, and because the evidentiary facts found by the Board show that the facilities present in this case permitted an effective distribution of union literature, notwithstanding petitioner's distribution rule, petitioner submits that it cannot be said on the "record as a whole" that it violated Section 8(a)(1) of the Act by "unreasonably impeding" its employees' rights of self-organization.

V. THE COMPLAINT AGAINST PETITIONER WAS A VERY NARROW ONE. THE BOARD'S DECISION SHOWS THAT THE BASIS FOR ITS DECISION WAS ONE OUTSIDE THE SCOPE OF THE COMPLAINT ON WHICH PETITIONER WAS TRIED.

The Board's finding was as follows:

"1. A majority of the Board finds, in agreement with the Trial Examiner, that the Respondent (petitioner here), by refusing to permit non-employee union organizers to distribute literature on its parking lot, violated Section 8(a)(1) of the Act." (R. 131a)⁵

⁵ The gravamen of the Complaint was that respondent's rule prevented union representatives from "circulating or distributing * * * pamphlets, literature and other written and printed material * * *" (G. C. Ex. 1C, paragraphs 5 and 6; R. 6a). The

The record shows that the Board found no facts other than those found by the Trial Examiner. The separate decisions by Members Farmer and Peterson on one hand and by Members Rodgers and Murdock on the other, both indicate that they regarded "inaccessibility" to be the sole test. (R. 130a-135a.)

In view of the above, "inaccessibility" must appear as the *ratio decidendi*, and nothing else.

We submit that a fair and reasonable evaluation of the whole record and the findings of the Board can lead only to the following conclusion:

It was possible, and it was not unreasonably difficult for union organizers either by themselves or through their union adherents among the employees effectively to distribute all "pamphlets, literature and other written and printed material" which the Union sought to distribute.

Examination of the Board's decision and of its brief in the Court below show that "inaccessibility" was not the real basis for the Board's decision. The real reason for its order is "opportunity for discussion."

Where does this "opportunity for discussion" come from? Certainly not from the Complaint. That seeks relief only as to distribution of "pamphlets, literature and other written and printed matter" (G. C. Ex. 1C; R. 6a). It comes from the Trial Examiner's finding that:

(Continued from preceding page)

charge filed by the Union had alleged that the petitioner had denied the Union the right to distribute literature on the premises "although the employer permitted the distribution of anti-union literature at said location on its premises." (G. C. Ex. 1A; R. 2a-3a, paragraph 1). In other words, the Union's charge had involved discrimination. However, the Complaint by the Board (on which trial was held) deleted all charges of discrimination and the Board affirmatively held that none had been practiced (R. 104a).

"* * * Union International Representative Peters has had the following difficulties in distribution at the gates: Cars sometimes do not stop; when they do there is no opportunity for discussion with employees. * * *" (R. 106a.)

In the Court below, the Board's brief was replete with that argument, as shown by the following:

"* * * the statutory guaranty of free self-organization necessarily includes * * * the correlative right of a union, its members and officials * * * to discuss with and inform the employees about the advantages of self-organization."

(Board Brief in Case 12,362, CCA-6, p. 8.)

"Union representatives accordingly cannot distribute literature outside the plant in an *unhurried* fashion with an opportunity for discussion. * * *"

(Board Brief in Case 12,362, CCA-6, pp. 10-11)

"Cars that stop for literature or to ask questions only cause the drivers to become impatient. * * *"

(Board Brief in Case 12,362, CCA-6, p. 11.)

"All those interested in literature would have a chance to receive it and, *more important*, would have ample opportunity to discuss any questions with the union representative. For it is especially in the latter respect that a restriction against union representatives handicaps employees in the exercise of their rights under the Act."

(Board Brief in Case 12,362, CCA-6, pp. 11-12.)

There we have the *real* basis for the Board's decision. The Union's "difficulties" in this case did not relate to distributing "pamphlets, literature and other written and printed material"; its difficulty lay in its inability to induce the employees to come to the Union office or to Union meetings at Eagles' Hall. For those reasons it sought to require the petitioner to supply its representatives with a

forum on petitioner's property whereat they would have an "opportunity to discuss" the union with the employees.

The Board also found that some drivers failed to open their car windows to receive union literature, which it apparently felt increased the Union's "difficulties." But the Act expressly gives to employees:

"the right to refrain from any or all of such activities."

(Section 7, 61 Stat. 136, 29 U. S. C. 151 et seq.)

The Board apparently seeks to impose upon employees who desire to refrain from union activities (as guaranteed to them by the Act), the obligation to permit themselves to be subjected to being "buttonholed" by distributors of union literature. It apparently seeks to require the petitioner to grant to outside union representatives the "opportunity of discussion" with all its employees.

As we have hereinbefore shown, denial of an "opportunity for discussion" was not charged against the petitioner. If the Board had intended to charge the petitioner with a violation in that regard,

"It should have amended its complaint accordingly * * * and introduced proof to sustain the charge."

Consolidated Edison Co. v. NLRB, 305 U. S. 197, 238.

An order of the Board, when enforced, is analogous to an injunction or a restraining order, and may not be issued on a matter not complained of. *Consolidated Edison Co. v. NLRB*, 305 U. S. 197; *Globe Cotton Mills v. NLRB*, 103 F. (2d) 91; *NLRB v. Kanmak Mills, Inc.*, 200 F. (2d) 542.

Certainty of such an injunctive order is important because "violation of the order brings the swift retribution of contempt, without the normal safeguards of a full-dress proceeding." *NLRB v. Stowe Spinning Co.*, 336 U. S. 226, 233.

From the foregoing discussion, petitioner contends that it clearly appears that the actual *ratio decidendi* was lack of "opportunity for discussion"; that petitioner was not charged with any such violation; that petitioner is under no legal obligation to supply such an opportunity in any event;⁶ and that for this reason alone the Board's order should not have been enforced by the Court below.

VI. ENFORCEMENT OF THE BOARD'S ORDER IN THIS CASE WOULD CONSTITUTE A TAKING OF PETITIONER'S PROPERTY IN VIOLATION OF THE FIFTH AMENDMENT.

The petitioner contends that the points hereinbefore discussed require reversal of the Board's order on the basis of decisional principles. Further, enforcement of the Board's order in this case would constitute a taking of petitioner's property in violation of the Fifth Amendment.

The constitutionality of the National Labor Relations Act was sustained by this Court under the "commerce" clause of the Constitution. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U. S. 1 (1937); *Polish National Alliance v. NLRB*, 322 U. S. 643 (1944).

However, this Court held at an early date as follows:

"But like the other powers granted to Congress by the Constitution, the power to regulate commerce is sub-

⁶ In effect, the Board's order would reinstate a form of its now discredited *Bonwit-Teller* doctrine by requiring petitioner to grant to the union use of its premises (but not of the plant itself) in order to make a forum for discussion available to the Union.

The doctrine was first established in *Clark Bros. Inc.*, 70 NLRB 802, (1947), affirmed in 163 F. (2d) 373. The Labor-Management Relations Act of 1947 was found to have been intended to change the rule of the *Clark* case in *Sabcock & Wilcox*, 77 NLRB 577 (1948). The Board revived the doctrine in a modified form in *Bonwit-Teller*, 96 NLRB 608 (1951), but finally bowed to the will of Congress and discarded the principle in *Livingston Shirt Corp.*, 107 NLRB 400 (1953).

ject to all the limitations imposed by such instrument, and among them is that of the Fifth Amendment * * *. Congress has supreme control over the regulation of commerce, but if in exercising that supreme control, it deems it necessary to take private property, then it must proceed subject to the limitations imposed by this Fifth Amendment, and can take only on payment of just compensation." (Emphasis ours.)

Monongahela Navigation Co. v. U. S., 148 U. S. 312, 336 (1893).

See also *Railroad Retirement Board v. Alton Railroad Co.*, 295 U. S. 330 (1934).

So it is in the instant case. The Board's order constitutes a taking of petitioner's property by the government for the private use of outside union organizers.

Petitioner recognizes that under certain circumstances the courts have held that:

"It is not every interference with property rights that is within the Fifth Amendment. * * * Inconvenience or even some dislocation of property rights may be necessary in order to safeguard the right to collective bargaining." 324 U. S. at 802.

Without accepting as sound the theory of dislocation of property rights secured by the Fifth Amendment, petitioner believes that it is not necessary to challenge the theory to secure reversal of the Board's order in this case. *Arguendo*, that it could constitutionally do so, Congress has at no time evidenced any intention of destroying property rights secured by the Fifth Amendment in favor of protecting employees' rights under the Act. And most certainly if the "dislocation" rule (invented by the Board, and not by Congress) is to have any validity, a very strong case would have to be found before it could apply. Indeed, every effort should be made by a court to avoid its application.

The facts in the instant case show that application of the rule here would go far beyond those cases in which it has been employed in the past, as is shown by the following discussion.

The "dislocation" rule was first approved by the Court of Appeals for the Second Circuit in *NLRB v. Cities Service Oil Co.*, 122 F. (2d) 149. There the employer refused to permit Union representatives *who represented some of its employees* to come aboard its tanker where the employees *worked and lived* in order to investigate and negotiate concerning grievances.

That the Second Circuit would not have applied its "dislocation" rule in the instant case is clearly shown by its statement in that case that:

"There can, however, be no reason for giving the representatives of the Union passes in order that it may solicit new members or collect dues. Such activities were not shown by the Board to have been required 'for the purpose of collective bargaining or other mutual aid or protection' even if they are guaranteed under Section 7 under some circumstances." 122 F. (2d) 149, 152.

Therefore, it is clear that the Second Circuit in the *Cities Service* case refused to permit that type of activity which the Board ordered petitioner to permit in the instant case.

In *NLRB v. Le Tourneau*, *supra*, this Court in a footnote quoted the "dislocation" rule enunciated by the Second Circuit in *Cities Service* with apparent approval. There this Court held that some dislocation of the employer's property rights was necessary in order that its employees might be permitted to distribute union literature on company property during their non-working hours.

However, as was earlier pointed out, the rationale of *Le Tourneau* is not applicable in the instant case, because petitioner permits its employees to distribute literature on its property during their non-working time.

The Court of Appeals for the Sixth Circuit applied the "dislocation" rule in *NLRB v. Lake Superior Lumber Corp.*, 167 F. (2d) 147 (1948), and held that the employer there violated the Act by refusing to permit union organizers, who were the bargaining agents for its employees, access to its lumber camp which was situated some 18 miles from the nearest town.

The *Lake Superior Lumber* case was comparable to the *Cities Service* case in that the employees lived and worked on their employer's property. Compare the decision of the Sixth Circuit in *NLRB v. West Kentucky Coal Co.*, 116 F. (2d) 816, in which the Court affirmed a Board order which prevented the employer

"from denying to its employees who reside in houses owned by the (employer) the right to have any persons call at their homes for the purpose of consulting, conferring or advising with, talking to, meeting or assisting, the (employer's) employees or any of them in regard to the rights of said employees under the Act to self-organization."

West Kentucky Coal Co., 10 NLRB 88, 133.

The most recent case in which this Court had occasion to apply the "dislocation" rule was *NLRB v. Stowe Spinning Co.*, *supra*. But it was only on the basis of the fact that

"What the Board had found, and all we are considering here, is discrimination." 336 U. S. 226, 233.

that this Court held that "inconvenience or some dislocation of property rights" was justified.

The rationale of the decisions in cases such as *Cities Service Oil Co. supra*, *Le Tourneau, supra*, *Stowe Spinning, supra*, and *Lake Superior Lumber Co., supra*, is but a logical extension of cases previously decided by this Court.

In *Marsh v. Alabama*, 326 U. S. 501, this Court held invalid an application of a state law of trespass when applied to the distribution of literature in a company-town. Obviously, the ownership of the town by an employer would have entirely vitiated all right of communication or assembly if the usual trespass rules were applicable. The case may therefore be taken as holding only that "the public has the same rights of discussion on the sidewalks of company towns that it has on the sidewalks of municipalities." *NLRB v. Stowe Spinning Co.*, 336 U. S. 226, 242. And compare *Thomas v. Collins*, 323 U. S. 516 and *Hague v. C. I. O.*, 307 U. S. 496.

The cases discussed above show that the Courts have found it necessary to apply the "dislocation" rule in order to safeguard the rights granted employees under the Act only in the following specific situations:

1. Where union organization could not proceed outside company property because the employees worked and lived in "company towns," "lumber camps" or on tankers, so that they were inaccessible to outside union organizers. *NLRB v. Lake Superior Lumber Co.*, 167 F. (2d) 147; *NLRB v. Cities Service Oil Co.*, 122 F. (2d) 149.

2. Where employees were prohibited from distributing literature during non-working hours on their employer's property. *NLRB v. Le Tourneau*, 324 U. S. 793, and

3. Where the employer enforced his rules in such a manner as to "discriminate" against outside Union organizers. *NLRB v. Stowe Spinning Co.*, 336 U. S. 226.

How different those situations are from that here present! Here the Board found that no discrimination existed; no employees had been discharged for union activity; the employer's background was completely "clean"; the employees were easily accessible to non-employee organizers outside of company property and the Board made no finding (and it could not) that the petitioner's rule was motivated by anti-union bias.

The circumstances of this case call into play with even greater effect the statement by Mr. Justice Reed that further extension of the *Le Tourneau* rule "raises serious problems under the Fifth Amendment." 336 U. S. 226, 244.

Rights of employees are not more sacred than the rights of employers. In recent years, emphasis has been placed on certain rights of free speech, freedom of the press, freedom of religion, etc., but none of these has any greater force or higher sanction than the rights of private property.

Enforcement of the order of the Board in this case would require petitioner to throw open its property to non-employee union organizers in order that they might distribute union literature thereon, although effective distribution of such literature can be made and was made by non-employees outside petitioner's property, and by employees on petitioner's property.

Nowhere in the Act do we find any such requirement. Nowhere in its legislative history do we find any suggestion that Congress intended any such result. Definite legislative language only would authorize such a construction of the Act. *U. S. v. C. I. O.*, 335 U. S. 106, 120-121.

Under the circumstances of this case, it is clear that enforcement of the Board's order herein would result in a taking of petitioner's property although no factual situation exists (such as hereinbefore discussed) which makes

such action necessary to safeguard the employees' rights under the Act. Therefore, enforcement of the Board's order would violate petitioner's rights under the Fifth Amendment to the United States Constitution. As was once stated by Mr. Justice Jackson:

"The essence of our free Government is 'leave to live by no man's leave, underneath the law'—to be governed by those impersonal forces which we call law.

Such institutions may be destined to pass away. But it is the duty of the Court to be last, not first, to give them up." *Youngstown Sheet & Tube Co. v. Sawyer, et al.* (Steel Seizure case), 343 U. S. 579, 654-655 (1952).

CONCLUSION.

Petitioner recognizes that law is built up over a period of years by decisions in specific situations as they arise from time to time. The constitutionality of the framework of the Act, once so seriously questioned, is now accepted.

However, we now find a situation where step by step, the Board, with approval of some of the courts, seeks to arrive at a goal which would encroach on rights which it has no statutory or constitutional authority to invade. The paragraphs below show how the present stage was reached.

The protection of an employee's right to engage in union activity on company property, but on his own time, came first. *Peyton Packing Co.*, 49 NLRB 828, 843. From that arose the requirement that under the circumstances there present, an employer be required to permit his employees to distribute union literature on his parking lot during their free time. *Le Tourneau, supra*.

Then arose the line of decisions that where an employee worked and lived on the employer's premises, he

was entitled to confer at his home with the union representatives. *Cities Service Oil Co., supra, Richfield Oil Co., supra, Lake Superior Lumber Co., supra*, and the theory that where an employer "discriminated" in the use of his property (majority decision in *Stowe Spinning Co.*); or interfered with the use of his property on the basis of anti-union bias after its use had been granted to a fraternal agency (Mr. Justice Jackson's opinion in *Stowe Spinning*), such conduct violated the Act.

The basic principles underlying the foregoing decisions can be rationalized and understood. But when the Board seeks to extend those decisions even further to seize the petitioner's property in order to require it to *discriminate in favor of a union* (as against organizations such as the American Legion), and without express statutory authority, the time has come to call the Board to a halt.

For the reasons stated, the judgment of the court below should be reversed and remanded to the court below with directions to set aside the order of the Board.

Respectfully submitted,

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December, 1955.

APPENDIX.

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. 151, et seq.), are as follows:

RIGHTS OF EMPLOYEES.

"Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)."

UNFAIR LABOR PRACTICES.

"Sec. 8(a). It shall be an unfair labor practice for an employer—

- (1). to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in Section 7";

PREVENTION OF UNFAIR LABOR PRACTICES.

"Sec. 10(e). The Board shall have power to petition any United States court of appeals (including the United States Court of Appeals for the District of Columbia), or if all the United States courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for

appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its members, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its origi-

nal order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in its sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 349)."

The Fifth Amendment to the United States Constitution provides as follows:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."